

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of )  
 )  
Amendment of Section 73.202(b), ) MB Docket No. 03-12  
Table of Allotments, ) RM-10627  
FM Broadcast Stations. )  
(Charles Town, West Virginia and Stephens )  
City, Virginia) )

MEMORANDUM OPINION AND ORDER  
(Proceeding Terminated)

Adopted: February 15, 2006

Released: February 17, 2006

By the Assistant Chief, Audio Division, Media Bureau:

1. The Audio Division has before it: a Petition for Reconsideration of the *Report and Order*<sup>1</sup> in this proceeding, filed by Mid Atlantic Network, Inc. ("Mid Atlantic"), licensee of Stations WINC(AM) and WINC-FM, Winchester Virginia; an Opposition to Mid-Atlantic's Petition for Reconsideration filed by Cleveland Radio Licenses, LLC ("Cleveland Radio"), permittee of Station WKSI-FM,<sup>2</sup> Stephens City, Virginia, a Reply to the foregoing Opposition filed by Mid-Atlantic; a Supplement to Mid-Atlantic's Petition for Reconsideration;<sup>3</sup> an Opposition to Mid-Atlantic's Supplement filed by Cleveland Radio; and a Reply to Cleveland Radio's Opposition filed by Mid Atlantic. For the reasons stated below, we deny the Petition for Reconsideration.

2. The *Report and Order* granted Cleveland Radio's request to reallocate Channel 252A, Station WKSI-FM, Charles Town, West Virginia, to Stephens City Virginia, as that community's first local aural transmission service, and modified Station WKSI-FM's license to specify Stephens City as its community of license. Cleveland Radio made the reallocation request pursuant to Section 1.420(i) of the Commission's rules,<sup>4</sup> which permits the modification of a station's authorization to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest.<sup>5</sup>

<sup>1</sup> 18 FCC Rcd 22038 (MB 2003)

<sup>2</sup> At the time the *Report and Order* was adopted, the call sign for this station was WXVA-FM.

<sup>3</sup> Mid Atlantic filed a Motion for Leave to Supplement its Petition for Reconsideration along with the Supplement itself. To assure a complete record in this case, we grant that motion. We have also considered the Opposition to that Supplement and the Reply to the Opposition.

<sup>4</sup> 47 C.F.R. § 1.420(i).

<sup>5</sup> See *Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989), *recon. granted in part*, 5 FCC Rcd 7094 (1990).

3. Mid Atlantic's Petition for Reconsideration of the *Report and Order*, asserts that Cleveland Radio should have submitted a *Tuck*<sup>6</sup> showing because Stephens City, Virginia, is located within the Winchester, Virginia Urbanized Area and Station WKSI-FM will cover 100 percent of that urbanized area with its 70 dBu contour. Mid Atlantic claims that Stephens City is not independent of the Winchester Urbanized Area, based on its analysis of Stephens City pursuant to *Tuck*. In addition, Mid Atlantic claims that Cleveland Radio, which is a subsidiary of Clear Channel Broadcasting Licenses ("Clear Channel"), is moving Station WKSI-FM to Stephens City in order to fulfill Clear Channel's plan to increase its market dominance of the Winchester Urbanized Area.

4. Cleveland Radio agrees that it should have submitted a *Tuck* showing as part of this rulemaking proceeding because it is located in the Winchester Urbanized Area, as defined by the 2000 U.S. Census, and its proposal would place a 70 dBu contour over 100 percent of that urbanized area. Cleveland Radio notes that when it filed its Petition for Rule Making, it relied on the 1990 U.S. Census, which did not include Stephens City in the Winchester Urbanized Area. Cleveland Radio has submitted a *Tuck* showing in its Opposition to Mid Atlantic's Petition for Reconsideration. As discussed below, Cleveland Radio has demonstrated that Stephens City is sufficiently independent of the Winchester Urbanized Area that the Commission can award Stephens City a first local service preference under priority (3) of the FM allotment priorities. Under *Tuck*, we examine such proposals by considering three criteria: (1) the signal population coverage, (2) the size and proximity of the proposed community to the central city of the urbanized area, and (3) the interdependence of the proposed community to the urbanized area.<sup>7</sup> The interdependence criterion is the most important criterion considered in making an allotment decision involving the proposed reallocation of a station to an urbanized area. With respect to the Winchester Urbanized Area, Stephens City is about 12 kilometers away from Winchester and Stephens City's 2000 U.S. Census population of 1,146 is approximately 5 percent of the population of Winchester (2000 U. S. Census of 23,585). These figures are similar to those where suburban communities were granted a first local preference.<sup>8</sup>

<sup>6</sup> *Faye and Richard Tuck*, 3 FCC Rcd 5374 (1988) ("*Tuck*").

<sup>7</sup> In *Tuck*, the Commission set forth eight factors in assessing the independence of a specified community: (1) the extent to which community residents work in the larger metropolitan area, rather than the specified community; (2) whether the smaller community has its own weekly newspaper or other media that cover the community's local needs and interests; (3) whether the community leaders and residents perceive the specified community as being an integral part of, or separate from, the larger metropolitan area; (4) whether the specified community has its own local government and elected officials; (5) whether the smaller community has its own zip code or telephone book provided by the local telephone company; (6) whether the community has its own commercial establishments, health facility and transportation systems; (7) the extent to which the specified community and the central city are part of the same advertising market; and (8) the extent to which the specified community relies on the larger metropolitan area for various municipal services such as police, fire protection, schools, and libraries. 3 FCC Rcd at 5378. The Commission has considered a community as independent when a majority of these factors demonstrate that the community is distinct from the urbanized area. See *Parker and St. Joe, Florida*, 11 FCC Rcd 1095 (M.M.Bur. 1996).

<sup>8</sup> See, e.g., *Chillicothe and Ashville, Ohio*, 18 FCC Rcd 22410 (MB 2003) (smaller community had less than one percent of the central city's population).

5. In this instance, a majority of the eight *Tuck* factors support a determination that Stephens City is independent from the Winchester Urbanized Area. With respect to *Tuck* factor (1), the extent to which community residents work in the larger metropolitan area, rather than the specified community, 2000 U.S. Census data indicate that 11 percent of Stephens City's employed residents work in Stephens City. This percentage, along with the presence of local businesses under *Tuck* factor (6), supports a determination of significant employment opportunities under *Tuck* factor (1).<sup>9</sup> Under *Tuck* factor (2), whether the smaller community has its own weekly newspaper or other media that cover the community's local needs and interests, Stephens City maintains a website which contains pertinent information about Stephens City businesses, municipal services provided by that city, job opportunities, schools and community activities. In addition, Stephens City publishes a bi-weekly newsletter providing citizens information on city events, seasonal city services, local ordinances, business licenses, and information provided by the Mayor and the Chief of Police. Although these media are relatively limited in scope, they are deserving of credit under *Tuck* factor (2). As to *Tuck* factor (3), whether the smaller community's leaders and residents perceive Stephens City as being separate from the Winchester Urbanized Area, Stephens City deserves a favorable finding. Stephens City was chartered in 1758. Although it was initially called Stephensburg, it is one of the oldest towns in the Shenandoah Valley. Under *Tuck* factors (4) and (8), Stephens City has its own local government and elected officials, and also has a town treasurer, town attorney, and town administrator. Its offices, departments and divisions include police, public safety, water and sewer, planning, zoning, street maintenance, refuse and recycling. Stephens City's Police Department consists of three officers and two auxiliary officers, while its Volunteer Fire and Rescue Company consists of two fulltime professional fire personnel and a volunteer staff. We recognize that many rural towns and Census Designated Places rely on the counties in which they are located to provide many services. In this case, Frederick County, in which Stephens City is located, provides public schools, a library, and some police and fire services for Stephens City. Stephens City does not rely on Winchester for these services. Thus, Stephens City deserves favorable findings under factors (4) and (8).

6. Under *Tuck* factor (5), Stephens City earns a favorable finding because it has a post office and its own zip code. Under *Tuck* factor (6), Stephens City has numerous commercial establishments, several health providers, civic organizations and churches, and a few businesses and organizations that use "Stephens City" in their names. Thus, Stephens City receives a favorable finding under *Tuck* factor (6). Insofar as *Tuck* factor (7) is concerned, we cannot make a favorable finding even though Stephens City has some local media under *Tuck* factor (2). In conclusion, the reallocation of Channel 252A from Charles Town, West Virginia, to Stephens City, Virginia, is supported by a majority of the *Tuck* factors. In light of all the relevant factors in this case, we find that changing the community of license of Station WKSI-FM from Charles Town, West Virginia, to Stephens City, Virginia, is in the public interest.

7. Mid Atlantic has also set forth competition-related arguments focusing on Cleveland Radio's decision to move Station WKSI-FM from Charles Town, West Virginia, to Stephens City, Virginia and the allegation that the addition of Station WKSI-FM to the Winchester Virginia market would "greatly reduce competition in the Winchester market." In regard to questions concerning the Commission's

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<sup>9</sup> The Commission has found that 16 percent of a community's workforce employed in the community is sufficient to support a favorable finding under *Tuck* factor 1. See *Anniston and Ashland, Alabama, and College Park, Georgia, et al.*, 16 FCC Rcd 3411 (MMB 2001).

multiple ownership rules and related issues concerning concentration of control of stations in the Winchester radio market, it is established policy not to consider such issues in conjunction with an allotment rulemaking proceeding. Rather, any issue with respect to compliance with Section 73.3555 of the Rules will be considered in conjunction with the application to implement the reallocation.<sup>10</sup> As the Commission has stated previously, this policy is intended "...to achieve an efficient and orderly transaction of both the rulemaking and the application process" and recognizes that "a rulemaking proceeding involves a technical and demographic analysis of competing proposals in the context of Section 307(b) of the Act."<sup>11</sup> Further, the Commission's *Ownership Order*<sup>12</sup> did not direct the staff to change this policy.<sup>13</sup> Consequently, concentration of control and multiple ownership issues are not bases for denial of this rulemaking proposal.

8. Accordingly, IT IS ORDERED That the Petition for Reconsideration and the Supplement thereto filed by Mid Atlantic Network, Inc., ARE DENIED.

9. IT IS FURTHER ORDERED That this proceeding IS TERMINATED.

10. For further information concerning the above, contact R. Barthen Gorman, Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos  
Assistant Chief  
Audio Division  
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<sup>10</sup> See *Chillicothe and Ashville, Ohio*, 18 FCC Rcd 22410, 22414 (MB 2003), *application for review pending*, and *Chillicothe, Ohio et al.*, 20 FCC Rcd 6305 (MB 2005), *petition for reconsideration pending*. See also, *Detroit Lakes and Barnesville, Minnesota, and Enderlin, North Dakota*, 17 FCC Rcd 25055, 25059-60 (MB 2002); and *Letter from Peter H. Doyle, Acting Chief, Audio Services Division, to Paul A. Cuelski, Esq. et al., File No. BAPH-20011101 ABD* (May 24, 2001).

<sup>11</sup> *Detroit Lakes and Barnesville, Minnesota, and Enderlin, North Dakota*, *supra* note 10, 17 FCC Rcd at 25059.

<sup>12</sup> See 2002 Biennial Regulatory Review-Review of Commission's Broadcast Ownership Rules and Other Rules, 18 FCC Rcd 13620 (2003), *aff'd in part and remanded in part, Prometheus Radio Project, et al. v. F.C.C.*, 373 F.3d 372 (2004), *stay modified on reh'g*, No. 03-3388 (3<sup>rd</sup> Cir. Sept. 3, 2004), *cert. denied*, 125 S. Ct 2902, 2903, 2904 (2005).

<sup>13</sup> See *Chillicothe and Asheville, Ohio*, *supra* note 10, 18 FCC Rcd at 22414.